DUNCAN HUGH COCKSEDGE
versus
CENTRAL AFRICAN BUILDING SOCIETY
and
THE RESERVE BANK OF ZIMBABWE
and
THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 20 October 2021 and 27 February 2023

Opposed application

Mr *T Biti,* for the applicant
Adv *T Mpofu,* for the 1st respondent
Mr *V Mhungu,* for the 2nd respondent
Mr *D Jaricha,* for the 3rd respondent

CHINAMORA J:

Introduction

This is an application which, in the main, seeks an order *ad pecuniam solvendam.* In other words, the claim is for the first respondent (hereinafter called "CABS") to pay to the applicant the sum of US$179, 541-45 within seven (7) days from the date of the order, plus 5% percent interest on the aforesaid sum from 5 December 2016 to date of payment. Alternatively, the applicant asks for an order that the respondents pay the applicant the sum of US$179, 541.45, jointly and severally, the one paying the others to be absolved. In addition, the applicant seeks an order nullifying the Exchange Control Directive No. R120/2018, and declares the provisions of s 22(1) (b) (d) and (e) of the Finance (No.2) Act 2019 to be unconstitutional, in that they violate ss 71 and 56 of the Constitution of Zimbabwe ("the Constitution"). Costs of suit in the main are sought against CABS, and in the alternative, against all respondents jointly and severally the one paying the others to the absolved.

Background facts

The present application is premised on facts which can be gleaned from the applicant's founding affidavit and supporting annexures, and the respondents' opposing affidavits and their annexures. I will now relate to the applicant's case under two subheadings, namely, claim in the main and claim in the alternative.

The applicant's claim in the main

The applicant kept a bank account with CABS under account number 1004220251. His case is that, as of 5 December 2016, the balance in his account was US$179,541-45. On 4 May 2016, the second respondent made a policy announcement to the effect that the central bank was going to introduce an export incentive in the form of bond notes. Prior to that, the second respondent had issued bond coins to compliment the multi-currency system. The policy statement dated 4 May 2016 said that the second respondent had acquired a US$200 million dollar foreign currency export facility to cushion the high demand for foreign exchange, and provide an incentive facility of up to 5% on all foreign exchange receipts including proceeds from tobacco and gold sales.

Further to the policy statement of 4 May 2016, through a Government Gazette Extraordinary, the President of Zimbabwe ("the President") enacted the Presidential Powers (Temporary Measures) Amendment of the Reserve Bank Act [*Chapter 22:15*]. Conscious of loss of value on his account, the applicant wrote to CABS on 6 December 2016 asking the bank to preserve his account and not to deposit any more funds. Subsequently, the applicant wrote to CABS again, on 2 June 2020, demanding payment of the sum of US$179,541-45, but the payment was not made. The exact language of the applicant was that:

> "…the bank that borrowed US$179, 000.00 from me in 2016, must now repay me the US$179,000.00 that I paid to it".

I now move to summarize the applicant's alternative claim.

The applicant's claim in the alternative

In asserting his *locus standi* in terms of s 85 (1) (a) of the Constitution, the applicant alleges the following: That on 22 February 2019, the President in terms of the Presidential Powers

(Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) (Statutory Instrument 33/2019), changed the law to provide that assets and liabilities denominated in United States dollars immediately before the effective date, i.e. 22 February 2019, shall on or after that date be valued in RTGS dollars on a one-to-one rate. Months later on 24 June 2019, the third respondent enacted the Reserve Bank of Zimbabwe Legal Tender Regulations (Statutory Instrument 142 of 2019). Following that, in August 2019, Parliament passed the Finance (No 2) Act, 2019 (No 7 of 2019). Of particular note, is that ss 21, 22 and 23 incorporated the provisions of Statutory Instruments 33/2019 and 142/2019. Thus, the applicant contends that, among other things, these legal provisions converted all US dollar balances that existed in Zimbabwe into local RTGS dollars at the exchange rate of one-as-to-one. Additionally, the applicant submits that in October 2018, the second respondent introduced the Exchange Control Directive RT/120/2018 which separated US dollar balances between those that were classified as Nostro FCAs and Nostro RTGS. For completeness of the record, and to understand the case before me, the Directive inter *alia reads*:

> **"DIRECTIVE ISSUED IN TERMS OF SECTION 35 (1) OF THE EXCHANGE CONTROL REGULATIONS STATUTORY INSTRUMENT 109 0F 1996**
>
> **1. Introduction**
>
> Reference is made to the Monetary Policy Statement announced by the Reserve Bank Governor on 1 October 2018, which presents measures aimed at strengthening the multicurrency system, enhancing business viability, price stability, increasing export generation capacity and improving market confidence. In order to operationalize these measures, authorized dealers are advised as follows:
>
> **2. Separation of Foreign Currency Accounts (FCAs) based on source of funds**
>
> 2.1 Given the need to enhance market confidence, promote transparency, incentivize generators of foreign exchange, promote efficient utilization of foreign currency and strengthen the multicurrency system, with immediate effect, FCAs are now separated according to the source of funds.
>
> 2.2 In this regard, foreign currency realized from offshore or foreign currency cash deposits shall be eligible for crediting into the individual or corporate Nostro FCA, while Real Time Gross Settlement (RTGS) or mobile money transfers and bond notes and coins deposits shall be credited into the individual or corporate RTGS FCA.
>
> …
>
> 11.2 Exchange Control regards compliance as key in ensuring attainment of this overriding objective as spelt out in the Monetary Policy Statement. Accordingly, authorized dealers are advised that Exchange Control will penalize any form of non-compliance in terms of the Exchange Control Rating System.

F Masendu
Director
EXCHANGE CONTROL"

It is this conduct of the second and third respondents which the applicant classifies as unlawful, grossly unreasonable and grossly irrational. Besides, the applicant alleges that the changes in law, effectively, amount to unlawful and unconstitutional expropriation of value. Consequently, the applicant submits that these actions violate the provisions of ss 56 (1) and 71 of the Constitution of Zimbabwe. These facts form the foundation of the applicant's alternative relief. Let me proceed to the case by CABS.

The case by CABS (first respondent)

CABS does not dispute that the sum of US$179,541-45 was deposited by the applicant in an account he holds with it before 22 February 2023. In the main, CABS opposes the application on the basis that its banking activities are regulated by the second respondent in accordance with the provisions of the Reserve Bank Act and the Banking Act (Chapter 24:20). It asserts that there is no dispute between CABS and its regulator, the Reserve Bank. The position of CABS is that it is obliged to comply with the second and third respondents' directives and the law and regulations prevailing at any given time. In fact, it asserted that CABS never made a secret or undue profit from the applicant's deposit, but was also affected by the changes in the economy and the monetary environment. Then it went on to explain why it cannot pay back the applicant in United States currency that he is seeking, and said:

> "… sometime in the life of this country, some surrogate currency was introduced without notice onto the market. It was introduced by the State. It was not introduced by the first respondent [CABS] .. the new currency was in actual fact utilized to retire the State's USD domestic debt … The actions of second and third respondents meant that customers in the position of the applicant had to be paid in terms of the surrogate currency. Those actions also meant that the big pot of funds held by CABS suddenly became surrogate currency. Where CABS had lent USDs, it was also being re-paid in terms of that surrogate currency. CABS is prepared to pay in terms of what is now called the surrogate currency, because this is all the money that it ever had"

CABS refrained from commenting on the unlawfulness and/or constitutionality of the Exchange Control Directive (the subject of these proceedings) and the cited provisions of the Finance (No.2) Act of 2019. Nevertheless, CABS contended that if the court were to find that

payment must be made to the applicant in United States dollars, it should be indemnified by the second and third respondents. Anticipating that outcome, CABS filed a claim for indemnification by the second and third respondents. I observe that the third respondent did not file an opposition to this claim. I will address this in my analysis of the case.

The second respondent's case

The second respondent opposed the application and raised two preliminary points, firstly, that the applicant had no *locus standi* to challenge the provisions of the Exchange Control Directive RT/120/2018. It contended that the said Directive was only issued to banks in their capacity as *authorized dealers*, and the applicant was not privy to that directive. As such, the submission concluded, the applicant had no *locus standi* to challenge a directive he was not privy to. The second objection was that the relief sought by the applicant is incompetent at law. It contended that, CABS cannot be ordered to pay the sum of US$179,541-45 in United States currency in the absence of an order invalidating Statutory Instruments 33/2019; 142/2019 and the Finance Act (No. 2) of 2019. The argument proceeded that, the amount deposited by the applicant was a loan to the bank, which meant that when CABS paid the second respondent it was paying its own money. The payment did not extinguish CABS' contractual obligation to pay the applicant the equivalence of the deposit on demand. According to the second respondent, the amount being a debt owed by CABS to the applicant before 22 February 2019, it was affected by the provisions of the Finance Act (No. 2) of 2019, which converted into RTGS at the rate of one to one to the United States dollar. The other argument advanced was that the Directive was issued under the provisions of the Exchange Control Regulations, Statutory Instrument 109 of 1996, which are extant. It was contended that. One cannot seek to impugn the Exchange Control Directive before the enabling Statutory Instrument is, itself, impugned or nullified. It is for these reasons that the second respondent concluded that the order sought was incompetent. Lastly, the second respondent submitted that the alternative claim was also incompetent, because there was no privity of contract between the central bank and a depositor at a bank. Therefore, based on the doctrine of privity of contract, the Reserve Bank of Zimbabwe argued that it cannot be held liable. I will return to the preliminary points later in my judgment.

In respect of the claim in the main, the second respondent contended that CABS acted in terms the law since its operations as a banking institution are regulated by law. Consequently, so

the argument continued, the applicant cannot impugn CABS' lawful acts. As an alternative submission, the second respondent argues that the s 71 of the Constitution, when read as a whole, makes it apparent that there are exceptions to the provisions relating to deprivation of property. As regards s 56 of the Constitution, it is the second respondent's contention that its provisions do not apply in this matter as it has not violated the applicant's right to equality and equal protection of the law. As a result, the second respondent prays that the application be dismissed with costs. Before I examine the law relevant to this dispute, let me look at the third respondent's submissions.

The third respondent's case

The third respondent raised a point in *limine* that it had been misjoined to these proceedings because, while it administers the Reserve Bank of Zimbabwe Act, it has no relationship with the transaction between the applicant and CABS in respect of the amount of US$179,541-45. It also submits that the relief sought is incompetent in so far as it requires CABS to pay back the amount in United States currency. The third respondent argues that Statutory Instruments 33/2019; 142/19 and the Finance (Act No2) of 2019 had to be nullified first. Additionally, the third respondent (like the second responded) argues that the Exchange Control Directive given under the provisions of Regulations which are extant and repeats the same argument made by the second respondent. I will return to deal with these preliminary points.

It is not disputed by the third respondent that, in October 2018, it ordered the separation of actual United States Dollars and RTGS balances which existed in deposits held by financial institutions, including banks. That ministerial directive was followed by the second respondent who issued the Exchange Control Directive RT120/2018. The second respondent argues that the applicant cannot claim the amount in United States Dollars. According to the third respondent, the effect of the directive was that the applicant's balance as at 5 December 2016 had become a RTGS FCA balance. It is on this basis that the third respondent contends that the applicant cannot allege deprivation of property in terms of s 71 of the Constitution or allege that the Finance (No.2) Act 2019 is unconstitutional. It contends that the changes which resulted in the conversion of one US dollar to one RTGS were done in terms of a law of general application. Thus, its argument was that the deprivation of property alleged meets the exception in s 71 (3) of the Constitution which,

inter alia, provides that no person may be compulsorily deprived of their property except in terms of a law of general application.

Furthermore, the third respondent denies that the Exchange Control Directive, being attacked, is irrational as it does not take away applicant's rights. It was argued that a core function of the second respondent is to regulate Zimbabwe's monetary system and to supervise banks, in addition to other responsibilities. The third respondent argued that there was nothing sinister in issuing the aforesaid directive, since it was a monetary regulation to ensure stability of the money market and preserve value of the actual United States Dollars in separating them from what became known as the RTGS dollar (the surrogate currency). Let me now come back to the points in *limine*. Before that, let me mention a notable (if not, interesting development). As I was writing this judgment, my brother judge MAFUSIRE J delivered his judgment in *Penelope Douglas Stone and Anor v Central Africa Building Society and Others* HH 118-23. I have read it, but my views and conclusions, in the respects that they differ with those of my brother, should not be taken as a critique of his judgment. It is neither my province nor tradition to do so.

Points in *limine*

Before discussing the preliminary points raised by the second and respondents, I find it relevant to mention the instructive remarks of MATHONSI J in *Telecel Zimbabwe (Pvt) Ltd* v *PORTRAZ & Ors* HH 446-15, which are:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points in *limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points in *limine*…"

Between them, the two respondents raised preliminary points which, in my view, lack merit and are incapable of disposing the matter before me. It will be apparent as I deal with each point in turn.

The applicant's *locus standi*

The contention by the second respondent is that the applicant has no right or capacity to challenge the provisions of the Exchange Control Directive RT/120/2018. I do not have to repeat the basis of that argument as it is fully stated above. It is trite law that the principle of privity of

contract can be relaxed in circumstances where a third party can show that he/she is affected by the actions of or flaws arising from a contact to which he/she was not a party (See *Bindura Nickel Corporation Ltd* v *Zimbabwe Revenue Authority* 2008 (1) ZLR 152 and *Astra Steel Engineering (Pvt) Ltd* v *PM Manufacturing (Pvt) Ltd* HH 393-12). *In casu*, the applicant alleges that he is a third party who is affected by the Exchange Control Directive. In my view, the applicant's right or capacity to challenge the provisions of that directive can be little doubted.

Misjoinder joinder of the third respondent

The third respondent's case of misjoinder is fully canvassed above. I start by examining the applicant's alternative claim. Here, he prays for an order as against all the respondents for the payment of the sum of US$179,541-45. It is common cause that the third respondent had a hand in the formulation of the aforesaid directives. The reason for joining the third respondent is clearly stated by CABS, which avers that if the court were to find that payment must be made to the applicant in United States dollars, it should be indemnified by the second and third respondents. From the above it is clear that the joinder of the third respondent is one of necessity.

Sight must not be lost of one crucial fact. The provisions of the Exchange Control Directive RT120/2018 were issued in terms of the Exchange Control Regulations, Statutory Instrument 109 of 1996 made by the third respondent (as the responsible Minister). This is the directive that the applicant seeks to impugn. To me, it is inconceivable how any judgment or order resulting from this litigation can be enforced against the third respondent if he is not a party. In this context, the rendering of a judgment in the absence of an interested party was criticized by the Supreme Court in *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors* SC 40-15, when GOWORA JA (as she then was) pointedly stated:

> "In *Hundah* v *Murauro* 1993 (2) ZLR 401 the point was made that for a party who has a real interest in the matter to be bound by a judgment of the court such party should be cited…If only to ensure that it is bound by whatever judgment is given. Such an order does not bind it if it was not a party."

However, and in any event, r 87 of the High Court Rules, 1971 (then applicable) provides:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

Perhaps, it is worth stating that the same provision is replicated in r 32 (11) of the High Court Rules, 2021 (*"the new rules"*) Therefore, even assuming that there had been misjoinder of a party who should not be joined or who has no interest in the dispute, that alone would not prevent the court from determining the dispute as it pertains to those parties that are before it. For this reason, I dismiss the preliminary point for lack of merit.

Incompetent relief

As the second and third respondent have already stated their reasons for believing that the relief is incompetent, it is pointless to plough again over the same field. In a nutshell, their argument is that the relief cannot be sustained without first nullifying Statutory Instruments 33/2019 and 142/2019, and the Finance (No.2) Act, 2019. These respondents also contend that the Exchange Control Directive cannot be invalidated before impugning the provisions of Exchange Control Regulations, Statutory Instrument 109 of 1996, which birthed it. I do not believe the issue of incompetency of the relief, in the circumstances of this case, is a preliminary point in the strict sense, because a court can hardly decide on it without examining the merits of the case. For this reason, I dismiss it as a point in *limine* and will address it in the context of the merits of the case.

The law and the claim in the main

The issue before this court was succinctly captured by the applicant in para(s) 34, 37 and 95 of his founding affidavit. This affidavit appears on pp 3-17 of the record. I refer, in particular, to para 95 which reads:

> "I seek for a simple order *ad pecuniam solvendam* in respect of which based purely on the principles of banking law, the first respondent [CABS] must be ordered to pay me the sum of US$179,541-45 which stood in my CABS bank account number 1004220251 as of the 5th of December 2016."

There is no dispute about the existence of a banker and customer relationship between the applicant and CABS. The relationship is founded in contract. See *Standard Bank of South Africa* v *Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 530. However, the relationship between the applicant and CABS necessarily involves the second respondent, as the authority which exercises monetary regulatory authority over banks. Owing to this, CABS is correct in its submission that it could not defy the second respondent's directive or the law applicable to its operations as a banking institution.

The starting point, as I see it, is s 17 of the Banking Act, which states:

> "Subject to this Act, every banking institution shall conduct its business and other operations in accordance with sound administrative and accounting practices and procedures, adhering to proper risk management policies, and shall comply with the terms and conditions of its registration and with any directives given to it by the Reserve Bank or the Registrar [of Banks] in terms of the Act". **[My own emphasis]**

The language in s 17 is clear and peremptory, and permits of no ambiguity. There is no doubt that the directive, which the subject of this application, was binding on CABS as it was on other banking institutions. Banks are required to comply with financial statutes which regulate their operations. In the context of this case, s 22 of the Finance (No.2) Act 2019, is poignantly pertinent as it reads:

> "**Issuance and legal tender of RTGS Dollars and savings**
>
> (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations ('the effective date') –
>
> (a) that the Reserve Bank has, with effect from the effective date, issued an electronic currency called the RTGS Dollar;
>
> (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C (2) of the principal Act), immediately before the effective date, shall from the effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar; and
>
> (c) that such currency shall be legal tender within Zimbabwe from the effective date; and
>
> (d) that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States Dollar; and
>
> (e) that after the effective date any variance from the opening parity rate shall be determined from time to time by the rate at which authorized dealers under the Exchange Control Act exchange the RTGS Dollar for the United States Dollar on a willing seller-buyer-basis …."

It must also be noted that section 44C (2) of the same Act provides that:

> "(2) The issuance of any electronic currency shall not affect or apply in respect of –
>
> (a) funds held in foreign currency designated accounts, otherwise known as 'Nostro FCA accounts', which shall continue to be designated in such foreign currencies; and
>
> (b) foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

At this juncture, it is important to realize that the judgment in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N R Barber (Pvt) Ltd and Anor* SC 3-2020, settled the law on the one United States dollar to one RTGS dollar conversion. That judgment is extant. Thus, the current position is that Statutory Instruments 33/2019 and 142/2019, and the Finance Act (No. 2) of 2019 govern the monetary regime in this country. As there is no dispute about the clarity of the Exchange Control Directive and the Finance Act (No. 2) of 2019 sought to be impugned, as well as the decision in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N R Barber (Pvt) Ltd and Anor supra*, I disagree that by abiding by the directive and the Finance Act (No. 2) of 2019, CABS had failed in its duty to exercise reasonable care and skill in respect of the applicant's account held at its branch as argued by *Mr Biti*. On the contrary, a registered and regulated banking institution would, in my view, be acting to the detriment of its clients if it behaves like a rebel and disobey the country's banking laws and directives issued by its regulators. Section 17, as we have seen, makes this mandatory. My view is that no fault can accrue to CABS for complying with the law.

The question that must immediately posed and answered is: does the applicant's account falls within the ambit of s 44C (2) of the Reserve Bank Act? To answer this, I must examine whether the applicant's foreign currency was realized from offshore or foreign currency cash deposits which were eligible for crediting into the individual or corporate Nostro FCA. From the papers before me, the applicant did not attach any document suggesting that the money claimed was realized from offshore or was a foreign currency cash deposit. It is settled law that a party who makes a positive allegation bears the burden to prove such allegation. See *Astra Industries Limited* v *Chamburuka* SC 258-11 and *Nyahondo* v *Hokonya & Ors 1997 (2) ZLR 457 (S) at 459*. In fact, the applicant's founding affidavit shows that the money in the account in issue was received from his clients from services rendered locally. Further, CABS' Annexure "B" at pp 66-227 of the record shows the applicant's transactions on the account. Having perused the entirety of this annexure, it is clear that the account was an individual RTGS FCA account. No offshore deposit or foreign currency cash deposit appears in entries running from pp 66 to 227.

The factual reality of how the account was utilized by the applicant (as the entries illustrate) reveals that CABS did not designate it as a Nostro FCA account in terms of Exchange Control Directive RT/120/2018. Consequently, the applicant's account is not covered by the provisions of s 44C (2) of the Act for the applicant to claim payment of the sum of US$179,541-45 in United

States dollars. From the foregoing, applicant's account cannot escape the consequences of the decision in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N.R. Barber and Anor supra.* For avoidance of doubt, the Supreme Court confirmed that all balances and liabilities which where denominated in United States Dollars prior 22 February 2019 became balances in Zimbabwean dollar at par with the United States dollar. The claim for repayment in United States currency cannot be sustained if it does not qualify under the provisions of s 44C of the Reserve Bank Act. I move on to consider if the directive is irrational.

The law and the claim in the alternative

(a) Whether the Exchange Control Directive RT/120/2018 is irrational

The applicant claims that the Exchange Control Directive RT/120/2018 is irrational and ought to be set aside. It is common cause that the directive was as a result of the policy directive by the third respondent. I turn to para 2.1 of the directive which gives the Government's rationale for issuing the directive. The paragraph is worth quoting again, and reads as follows:

> "Given the need to enhance market confidence, promote transparency, preserve value, incentivize generators of foreign exchange, promote effective and efficient utilization of foreign currency and strengthen the multicurrency system, with immediate effect, FCAs are now separated according to the source of funds"

The second respondent through the policy directive tried to preserve the value of the actual United States Dollars by separating them from what became known as the RTGS dollar. Mr *Mhungu* for the second respondent, emphatically submitted that:

> "… it is clear that the primary function of the second respondent [RBZ] is to protect the currency of Zimbabwe. This is fortified by the obligation imposed on the second respondent to have in issue and circulation bank notes and bank coins in Zimbabwean currency. The obligation … to regulate the monetary system clearly would allow the second respondent to give directives to distinguish the Zimbabwean currency from foreign currency".

In my view, the regulation of banking activities to achieve stability in the economic sector and protect the banking public falls exclusively within the realm of the Executive arm of Government. Put differently, how the Government makes policies aimed to achieve monetary stability and incentivize the generation of foreign exchange in the national interest is a political question, best left to the politicians. Courts in this jurisdiction are familiar with the political questions doctrine and how to deal with a case where this arises. In this respect, in *Nyambirai* v

National Social Security Authority and Anor 1995 (2) ZLR 1 (S) at 9H-10B, the Supreme Court deferred to executive wisdom. The following remarks are apposite:

> "I do not doubt because of their superior knowledge and experience of society and its needs and a familiarity with local conditions, national authorities are in principle better placed that the judiciary to appreciate what is to public benefit. In implementing social and economic policies, a government's assessment of as to whether a particular service or programme it intends to establish will promote the interest of the public, is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation unless, the assessment is manifestly without reasonable foundation".

In aforesaid case, the court had been invited to declare the compulsory contributions to NSSA as unlawful and unconstitutional. The court was urged to find that the contributions were not "reasonably justifiable in a democratic society." But it accepted the government's position as I have indicated above.

The reticence of courts to steer away from political questions is not a new phenomenon. In the United States, the jurisprudence in this area is well developed. For example, in *Luther* v *Boden* 48 US (7 How.) 1 (1849), WOODBURY J in the United States Supreme Court stated:

> "… we cannot rightfully settle those grave political questions which, in this case, have been discussed … , as judges, our duty is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong according to our private opinions, enforce till duly altered".

Later on in *Baker* v *Carr* 369 US 186 (1962), the United States Supreme Court explained why courts should refrain from deciding on political questions. The court (at page 217) correctly, in my view, said that in a political question, there are the following characteristics:

> ".. a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question".

The logic behind *Nyambirai* v *NSSA supra*; *Luther* v *Bodin supra* and *Baker* v *Carr supra* is compelling, and I propose to follow the same approach. In implementing the Exchange Control Directive RT120/2018, issued in terms of s 35 (1) of the Exchange Control Regulations Statutory Instrument 109 of 1996, the second and third respondents' reasons are clearly set out. The applicant

has not demonstrated in what way the directive is manifestly without reasonable foundation and, therefore, irrational. No basis exists, in my view, for not deferring to the Minister who made the policy decision on behalf of the Executive. Let me go further to say that, although the facts in this case differ from those in *Nyambirai* v *NSSA supra*, the principle enunciated in the *Nyambirai* v *NSSA* and, indeed, in the United States cases equally applies to this matter. My conclusion is that the Exchange Control Directive RT120/2018 is in the national and public interest. Consequently, this court must respect such policy directive and not interfere with it.

(b) Constitutionality of section 22 (1) (b), (d) and (e) of the Finance (No.2) Act of 2019

The applicant contends that the provisions of s 22 (1) (b), (d) and (e) of the Finance (No.2) Act of 2019 are unconstitutional and must be set aside. The argument is that these provisions violate s 56 (1) and 71 of the Constitution of Zimbabwe. Let me examine the applicant's thesis.

Protection of the law

Section 56 (1) of the Constitution is short and simple to understand. It provides:

> "All persons are equal before the law and have the right to equal protection and benefit of the law"

The Constitutional Court has had the opportunity to interpret the above constitution provision. In this regard, in *Nkomo* v *Minister of Local Government, Rural and Urban Development and Ors* CCZ 6-16, ZIYAMBI JCC explained the right as follows:

> "The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons."

I have already made reference to the entries on the applicant's account. The applicant failed to show that the deposits in his account constituted foreign currency realized from offshore or

foreign currency cash deposits. This factual reality excludes the applicant's account from the group of individual or corporate accounts which meet the requirements of s 44 C (2) of the Act, for eligibility to claim repayment in United States currency. I observe that in *Hamauswa* v *The President of the Republic of Zimbabwe & Ors* HH 551-19, CHATUKUTA J reviewed important cases dealing with s 56 of the Constitution, and concluded that discrimination cannot be used as a ground to nullify Statutory Instrument 33/2019. Additionally, *Adv Mpofu's* submission is quite relevant in this context, when he says:

> "Second respondent gave directions which were binding on CABS. Those directions govern the whole sector and were not specific to the first respondent. They are binding on the first respondent".

From the facts of this matter and CHATUKUTA J's apposite remarks in the *Hamauswa case*, where the applicant was also represented by Mr *Biti*, the allegation that the applicant has been the recipient of unequal treatment or protection is unfounded and baseless. If anything, he has not adduced any evidence to demonstrate that he has been treated differently from anyone who holds a bank accounts like his.

Breach of property rights

The applicant argues that the Exchange Control Directive and the Finance (No.2) Act, 2019 must be impugned on the basis that they violate his property rights as provided under s 71 of the Constitution of Zimbabwe. I will examine this argument. Section 71 (2) of the Constitution reads:

> "Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others."

Then, s 71 (3) of the same Constitution goes on to provide, *inter alia*, that no person may be compulsorily deprived of their property except if done in terms of a law of general application. It seems to me that the provisions relied on by the applicant do not apply to his case. As already indicated above, the applicant was never compulsorily deprived of his money. The willingness and offer to pay back by CABS puts paid to any suggestion that the applicant's money was compulsorily acquired by the second or third respondents. Even if, it is assumed that the applicant was compulsorily deprived of his money, I still have to consider whether or not such acquisition was done through a law of general application as contemplated by s 71 (3) of the Constitution. Such a

provision has been examined by the Constitutional Court in *Bernard Wekare* v *The State and Ors; Musangano Lodge (Put) Ltd* v *The State and Anor* CCZ 9-16. In *casu*, it can be said that the effect of the laws being challenged was to put a limitation to the enjoyment of the right to property (i.e. the funds in an account held by CABS). To the extent that the conversion at one US dollar to one RTGS dollar may be termed a limitation on the right to property, such a limitation was done through a law of general application. The applicant has not shown that the provisions the Exchange Control Directive RT120/2018 and the Finance (No.2) Act 2019 are not a laws of general application. As a result, I do not find any merit in applicant's argument, and am inclined to dismiss his application. Because of the conclusion I have reached, it is unnecessary for me to decide on the claim for indemnification of CABS by the second and third respondents.

Generally, costs follow the result; the applicant being unsuccessful must reimburse the Respondents' costs of suit. Undoubtedly, the respondents have been forced to defend the present application and incurred costs in the process. While in litigation which raises important constitutional issues, the usual practice is not to order cost against the losing party, my view is that an award of costs is necessary in this case. A reading of the applicant's founding affidavit shows that the applicant appreciates the consequences of decision in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N R Barber and Ors supra,* namely, that all assets and liabilities denominated in United States Dollars prior 22 February 2019 were valued at one-as-to-one with the RTGS dollar. Notwithstanding, that the said judgment is still extant the applicant filed this application seeking to be paid in United States dollars. It is tempting to believe that this application was a disingenuous stunt to try and reverse the effects of the judgment in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N R Barber and Ors supra.* I also find the claim for repayment in United States dollar against CABS a bit cynical, given that the banking institution was only complying with the law. I will therefore award costs on the scale of client and attorney in respect of CABS and costs on the ordinary scale to the second and third respondents.

In the result, it is ordered as follows:-

1. The points in *limine* be and are hereby dismissed.
2. The applicant's claim in the main be and is hereby dismissed.
3. The applicant's claim in the alternative be and is hereby dismissed.

4. The applicant to pay the first respondents' costs on the attorney and client scale.
5. The applicant shall pay the second and third respondents' costs on the ordinary scale.

Tendai Biti Law, applicant's legal practitioners
Gill, Godlonton & Gerrans, first respondent's legal practitioners
Mlotshwa & Maguwudzi, second respondent's legal practitioners
Civil Division of the Attorney General's Office, third respondent's legal practitioners